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A Study of Religious Requirements for Adoption

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A STUDY OF RELIGIOUS REQUIREMENTS FOR ADOPTION

In re Adoption of "E"

I. INTRODUCTION

In *In re Adoption of "E"*,[1] the Supreme Court of New Jersey held that church affiliation or belief in a Supreme Being could no longer be a necessary prerequisite to the qualification of prospective parents to adopt a child. In reversing the decision of the lower court, which had denied the application of otherwise qualified parents,[2] the court ruled that membership in an established religion may no longer be required by adoption agencies or by the courts[3] and that such an interpretation of the relevant New Jersey statute[4] was unconstitutional.[5] However, the court qualified its holding by stating that a review of religious beliefs is permissible when considering the moral and ethical fitness of the applicants.[6]

This Note will consider: (1) religious requirements of applicants for adoption; (2) how the courts view religion as bearing on the moral and ethical fitness of adopting parents; and (3) the New Jersey Supreme Court's discussion of the constitutional validity of the New Jersey statute which attempts to match the petitioner's and the child's religion. Since many states have similar religious protection laws,[7] a brief examination of the judicial interpretation and application of several state's statutes will be made.

II. FACTS AND HOLDING OF IN RE ADOPTION OF "E"

On June 27, 1969, the petitioners, John and Cynthia Burke, received custody of the baby girl "E" from the Children's Aid and Adoption Society.[8] The Burkes were highly intelligent and moral

1. 59 N.J. 36, 279 A.2d 785 (1971).
2. *In re* Adoption of "E", 112 N.J. Super. 326, 271 A.2d 27 (1970).
3. *In re* Adoption of "E", 59 N.J. 36, 50, 279 A.2d 785, 793 (1971).
4. N.J. STAT. ANN. § 9:3-27.
5. *In re* Adoption of "E", 59 N.J. 36, 45, 279 A.2d 785, 790 (1971).
6. *Id.* at 57, 279 A.2d at 796.
7. For a brief history of religious protection laws see, *List, A Child and a Wall: A Study of "Religious Protection" Laws*, 13 BUFF. L. REV. 9, 22 (1963); Comment, U. ILL. L. FORUM 114, 116-17 (1957); Note, 54 COLUM. L. REV. 376, n.5 (1954).
8. The Childrens Aid and Adoption Society of New Jersey is an

people who were able to provide a physically suitable home. This is evidenced by the fact that they had previously been found eligible to adopt another child who at the time of this application was unquestionably being well cared for.[9] The Burkes professed no belief in a Supreme Being, but claimed to be humanists.

At the hearing,[10] the trial judge directed most of his questions to the petitioners' lack of religious affiliation and their lack of a belief in the existence of a Supreme Being. In the judge's written opinion, he recognized that although courts are normally reluctant to intervene in matters of religion,[11] the "child should have the freedom to worship as she sees fit and not be influenced by parents or exposed to the views of prospective parents who do not believe in a Supreme Being."[12] The court believing the best interests of the child would not be served by permitting her adoption by persons unfit to assume the responsibility of adoptive parents denied the application and ordered a return of the child to the adoption society.[13] The finding of unfitness was based solely on the petitioners' lack of any belief in a Supreme Being. The New Jersey Supreme Court unanimously reversed, rejecting the trial judge's conclusion that an adoption could be denied automatically because the petitioners did not believe in a Supreme Being.[14] The court held, however, that religious considerations did play a role in an adoption petition, but only as one of many valid criteria in determining the moral and ethical responsibility of the petitioners. A lack of belief in a Supreme Being was not to be considered a lack of morals and ethics *per se*.

III. Religion Requirements in Several State Statutes

There were no adoption proceedings at common law, adoption proceedings are therefore statutorily controlled.[15] All states now have some type of statutory adoption procedures.[16] Forty-three jurisdictions have statutes concerning the role of religious consid-

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agency licensed and approved by the state in N.J. STAT. ANN. § 9:3-18 (1954).

9. *In re* Adoption of "E", 59 N.J. 36-41, 279 A.2d 785, 787-88 (1971).

10. A hearing before a County or Superior Court is required by statute in New Jersey before granting an adoption: N.J. STAT. ANN. § 9:3-20 (1954).

11. *E.g.*, Scanlon v. Scanlon, 29 N.J. Super. 317, 325-26, 102 A.2d 656 (App. Div. 1954); Donahue v. Donahue, 142 N.J. Eq. 701, 704, 61 A.2d 243, 245 (E. & A. 1948).

12. *In re* Adoption of "E", 112 N.J. Super. 326, 331, 271 A.2d 27, 30 (1970).

13. *Id.*

14. *In re* Adoption of "E", 59 N.J. 36, 45, 279 A.2d 785, 790 (1971).

15. In New Jersey the exclusive jurisdiction of adoption proceedings, formerly vested in the Orphans' Court, now reposes in the superior and county courts. *See, In re* Flasch, 51 N.J. Super. 1, 143 A.2d 208 (1958).

16. *E.g.*, Couch v. Couch, 35 Tenn. App. 464, 248 S.W.2d 327, 333 (1951).

erations in the adoption process from which three district approaches have been recognized:[17] (1) a mandatory interpretation, strictly applying a religious requirement,[18] (2) a discretionary approach whereby religion is considered as only one factor among many,[19] and (3) an approach giving little or no effect to religious beliefs.[20]

A. Mandatory Approach

Under the mandatory approach the petitioners' religious beliefs and affiliation are examined with other criteria to determine moral and ethical fitness, and the petition may be denied solely because the petitioners' religion does not match the child's.[21]

A leading case which applied this mandatory approach is *Petitions of Goldman*[22] in which the adoption of twin boys born of Roman Catholic parents was sought by the Goldmans, a Jewish couple. The adoption was denied even after the natural mother had signed the necessary consent form with full knowledge of the Goldman's religion. The Massachusetts Supreme Judicial Court, in affirming the denial of the Goldman's petition, took judicial notice that there were many fine Catholic families ready and willing to adopt children.[23] The petition was barred by statute be-

17. List, *A Child and a Wall: A Study of "Religious Protection" Laws*, 13 BUFF. L. REV. 9, 22 (1963).

18. Examples of jurisdictions whose courts apply a mandatory approach would be Massachusetts and New York. *See, e.g.*, Petition of Gally, 329 Mass. 143, 107 N.E.2d 21 (1952); Matter of Maxwell, 4 N.Y.2d 429, 176 N.Y.S.2d 281, 151 N.E.2d 848 (1958).

19. New Jersey and Pennsylvania use the discretionary approach. *See, e.g., In re* Adoption by B, 63 N.J. Super. 98, 164 A.2d 65 (App. Div. 1960); Commonwealth *ex rel.* Kuntz v. Stackhouse, 176 Pa. Super. 361, 108 A.2d 73 (1954). The discretionary approach differs from the mandatory approach in that it does not make religion the decisive factor. Rather, the paramount concern of the court in applying a discretionary approach is the promotion of the best interests and welfare of the child and relegating religious considerations to merely determining the petitioner's moral and ethical fitness.

20. The Missouri courts have consistently applied a "no weight" approach to adoption proceedings although the Missouri statute was apparently intended to be strictly applied. *See* MO. REV. STAT. §§ 210.160, 211.140, 211.390, 457.170 (1959). *See, e.g., In re* Duren, 355 Mo. 1223, 200 S.W.2d 343 (1947) (allowing Roman Catholics to adopt a Protestant child).

21. The New York and Massachusetts statutes are strictly applied by the courts leaving no discretion to the trial judge. For a fuller examination of New York's and Massachusetts' implementation of the mandatory approach, *see*, List, *A Child and a Wall: A Study of "Religious Protection" Laws*, 13 BUFF. L. REV. 9, 25-30 (1963).

22. 331 Mass. 647, 121 N.E.2d 843 (1954).

23. There is no authority for the court taking judicial notice of the

cause the necessary condition precedent, the lack of other families with the same religion as the child's ready and willing to adopt, was not met. That is, the Massachusetts statute prohibited an adoption where, as here, it was practical to find couples of the same religious faith as the child.[24] The court apparently failed to consider that there were no Catholic families seeking to adopt the twins at that time. This "hard-line" approach in the interpretation of the Massachusetts statute gives little or no consideration to the temporal welfare of the child by placing total emphasis in the first instance on the religious qualifications of the petitioners. Only if that requirement is satisfied will non-religious factors even be considered. A further illustration of the weight placed on religious considerations under the mandatory approach is the New York case of *In re Santos*.[25] In that case two apparently abandoned girls were committed to the care of a Jewish adoption agency. Two years later the natural mother of the girls sought to have the commitment vacated on the ground that the girls had been baptized Roman Catholic. Although the mother was found unfit to take the girls, the court nevertheless held that the applicable statute[26] necessitated removal of the children to a Catholic agency. Although the statute authorized the vacating of any commitment where a mistake as to the religion of the child had been made, the court by its application of the statute makes the law mandatory, leaving no room for judicial discretion which the statute apparently authorizes. This absolute application of the statute was of questionable value to the girls' best interests, temporal or spiritual, because they had, while in the Jewish institution, befriended other children and had learned the Jewish religion, the only religion they had really been exposed to. Such a religious transplanting seems hardly justified on the mere assertion of a neglecting mother that two years previous the girls were Roman Catholic merely because she was Roman Catholic.

The importance of the *Goldman* and *Santos* decisions is twofold. First, the religion of the child is given such emphasis that it precludes other relevant considerations. In the *Goldman* case, the preservation of a religion not yet understood by the child was

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fact that there are families of the same religion ready and willing to adopt except in the dissenting opinion in *Purinton v. Jamrock*, 195 Mass. 187, 80 N.E. 802 (1907).

24. The Massachusetts statute states, "In making orders for adoption, the judge *when practicable* must give custody only to persons of the same religious faith as that of the child." MASS. GEN. LAWS ANN. Ch. 210, § 5B (1955) (emphasis added).

25. 278 App. Div. 373, 105 N.Y.S.2d 716 (1st Dept. 1951).

26. The court *may* at any time during the progress of a proceeding arising under any provision of the act vacate any commitment previously made where it can be shown to the satisfaction of the court that a mistake of fact was made in adjudicating the child's religion. . . .
N.Y.C. DOM. REL. CT. ACT, § 86(3) (emphasis added).

considered so important that not even the natural mother of the twins was free to change it by consenting to the Goldman's adoption. Such a position is disturbing in light of the following facts: the children were only Catholics because their mother was Catholic; the children were never baptized into the Roman Catholic faith; and the mother was a non-practicing member. Since the mother had done nothing in protecting her parental right to determine the religion of her child, the court could have held the statute inapplicable. However, the court in dismissing all of these factors stated, "We do not attempt to discuss the philosophy underlying the concept that a child too young to understand any religion, even imperfectly, nevertheless may have a religion. . . ."[27] Thus the religion of the child, whether he has been baptized[28] or merely had such religion imputed to him, will be considered controlling by mandatory interpretation courts in determining whether the applicants qualify to adopt that child.[29]

In *Santos* as in *Goldman* it appears that the court in applying a mandatory approach seems to give inordinate weight to religious compatibility with at best only passing concern to the temporal welfare of the child. Indeed, the satisfaction of the religious criterion is a virtual condition precedent to weighing the non-religious factors. The religious factor is considered far beyond the usual test which determines the child's temporal best interests when there is no religious difference and goes more to establishing an independent controlling factor, *i.e.*, Spiritual welfare.

In the mandatory jurisdictions, the question has arisen of how to apply the law when the natural parents neither embrace nor practice a religion which can be imputed to the child. The *Goldman* court, by way of dictum, assumed that the statute would be inapplicable.[30] However, such a case did arise in New York four years after *Goldman*. In *Matter of Maxwell*,[31] the court of appeals could have applied the Goldman dictum and held New York's statute to be inapplicable since the parents claimed no religion at

27. Petitioners of Goldman, 331 Mass. 647, 652, 121 N.E.2d 843, 846 (1954).

28. A child need not be formally baptized in a religion before he can be deemed to be of that religion. The child may hold a religion either by having the religion of his mother judicially imputed to him, or under the parental right theory the natural parents may specify the child's religion until the child reaches the age of discretion.

29. *See* text accompanying notes 23, 24 *supra*.

30. In Goldman, the court specifically said that, "if neither parent had any religion we suppose the statute would have no application." Petitions of Goldman, 331 Mass. 647, 653, 121 N.E.2d 843, 846 (1954).

31. 4 N.Y.2d 439, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958).

all and the child was not baptized. Instead, the court took New York's mandatory approach to its logical (or illogical) conclusion and imputed Roman Catholicism to the child solely because the court found evidence that the natural parents had been baptized Roman Catholics, even though neither parent was a practicing member of any religion. What is all the more remarkable about the court's action is that it recognized the child as Roman Catholic when that church did not recognize the child as being one of its members.[32]

However, the court did stop one step short of a completely tragic decision by permitting the Presbyterian Maxwells to adopt the child on the condition that the child be raised as a Roman Catholic.[33] Although this result may be viewed as a relaxing of the mandatory approach in New York, religion was nevertheless the primary consideration to which the temporal interests of the child were clearly subordinated.

B. Discretionary Approach

The majority of states have employed a discretionary interpretation of adoption statutes containing a religious requirement. Two of these jurisdictions are Pennsylvania[34] and New Jersey.[35] These "discretionary" courts generally view the "when practical" or "whenever possible" language commonly found in the adoption statutes as not binding on the court, but as discretionary only.[36] Although religion is still a factor in the court's consideration, the primary concern is the temporal welfare or best interests of the child. Although a matching of the child's religion with that of the petitioners may be a significant factor[37] in the discretionary court interpretation, unlike under the mandatory approach, a fail-

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32. The child in this case would not be recognized as a member of the church under Roman Catholic ecclesiastical law because the child had not been baptized.

33. Several previous cases have allowed cross-religious guardianships, but with the condition that the child be raised in his own religion and only when the child's best interests compelled the cross-religious placement. *See, In re* Hauser, 189 N.Y. Supp. 51 (Surr. Ct. 1921); Matter of Mancini, 89 Misc. 83, 151 N.Y. Supp. 387 (Surr. Ct. 1915).

34. *E.g.,* Commonwealth *ex rel.* Kuntz v. Stackhouse, 176 Pa. Super. 36 108 A.2d 73 (1954).

35. *E.g., In re* Adoption by B, 63 N.J. Super. 98, 164 A.2d 65 (App. Div. 1960); *See also* Note, 10 SYRACUSE L. REV. 124 (1958).

36. *See, e.g.,* PA. STAT. ANN. tit. 1, § 1(d) (Supp. 1971), providing in part that "whenever possible the petitioners shall be of the same religious faith as the natural parents."

37. In *In re* Adoption of "E", the significance of religion is explicitly recognized though determined not to be controlling.

> It is implicit to our decisions as well as those of other states that religion may be viewed as a relevant factor in determining custody or adoption but, without other factual support, the religious factor is not controlling.

In re Adoption of "E", 59 N.J. 36, 48, 279 A.2d 785, 791 (1971).

ure to so match will never in and of itself prevent an adoption[38] if the court is convinced that the child's best interests are served.[39] The petitioner's religion will be considered along with other factors no one of which can prevent an adoption. However, these factors taken together aid the court in determining whether the petitioners have the moral and ethical qualifications necessary to properly raise the child.[40] For example, if the petitioners had no religious affiliation in a jurisdiction whose courts followed a discretionary approach, that fact alone would not completely bar the adoption, but it would be used as a factor in that court's determination of the petitioner's moral and ethical fitness. If the same facts were presented to a mandatory approach court, the absence of any religious affiliation would be sufficient to preclude the adoption.[41]

The discretionary approach was recognized in New Jersey as early as 1929 in *Ex parte DeBois*.[42] Therein the natural father sought custody of his own child. The society in which the child had been previously placed refused to give the father custody because the child was Roman Catholic and the father was not. In ruling on the father's petition, the Court of Chancery of New Jersey held that,

> The question of religious faith and education is of course, one to be taken into consideration in such cases as this; *but assuredly it is not true either as a legal or practical proposition, that that factor is controlling above all others.* And when it appears, as it does in this case, that petitioner and his wife are entirely willing that the child should continue in that faith, its importance as a factor diminishes almost to the vanishing point.[43]

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38. *In re* Adoption of "E", 59 N.J. 36, , 279 A.2d 785, 791 (1971).

38. *In re* Adoption of "E", 59 N.J. 36, 48, 279 A.2d 785, 791 (1971). be given the child's temporal interests by stating,

> [I]t is well established by statute and case law that the paramount concern of the court in awarding custody of a child is the promotion of the best interests and welfare of the child.

In re Adoption of "E", 59 N.J. 36, 45, 279 A.2d 785, 791 (1971). *See generally, In re* N, 96 N.J. Super. 415, 233 A.2d 188 (App. Div. 1967); *In re* Jacques, 48 N.J. Super. 523, 138 A.2d 581 (Ch. Div. 1958). The New Jersey statute provides that if the court is "satisfied that the best interests of the child would be promoted by the adoption, the court shall enter a judgment of adoption." N.J. STAT. ANN. § 9:3-27c.

40. . . . *religion when coupled with other considerations* may be a factor to be weighed by the court in determining the advisability of granting an adoption. . . .

In re Adoption of "E", 59 N.J. 36, 50, 279 A.2d 785, 793 (1971).

41. Petitions of Goldman, 331 Mass. 647, 121 N.E.2d 843 (1954); *In re* Santos, 278 App. Div. 373, 105 N.Y.S.2d 716 (1st Dept. 1951).

42. N.J. Misc. 1029, 148 A. 10 (Ch. 1929).

43. *Id.* at 1033, 148 A. at 12.

This diminishing value of the religious factor has been evidenced in other instances. Thus where the adopting parents' home would provide some religious training, the question of sect or denomination has been held not to be determinative.[44] Although not determinative, the fact that the petitioners would better promote the child's religious or spiritual welfare, or that the petitioner's home would offer superior facilities for religious training has been considered by the courts as one of many key factors in projecting the child's best interests.[45]

Turning to the discretionary approach of New Jersey and specifically to *In re Adoption of "E"*, it is easy to see that the lower court's denial of the Burke's petition because of their lack of religious affiliation was contrary to the normal discretionary position and was accordingly reversed by the New Jersey Supreme Court. That court in its majority opinion first looked to the controlling statute which had as its purpose, the protection of children "from adoption by persons unfit for such responsibility" and the promotion of the child's best interests.[46] The majority did not believe, as the lower court had, that the child's best interests would be served by denying the adoption solely on the religious question. However, in determining the fitness of the petitioners as required by the New Jersey statute, the court recognized the validity of probing into the petitioner's religious beliefs to determine their moral and ethical fitness. "Religion and morality are inextricably interwoven . . . and a high moral character of prospective adopting parents is an essential consideration in adoption proceedings."[47] Since a sincere belief and following of a religious persuasion may be indicative of moral fitness to adopt, the court felt it should be able to inquire into such beliefs.[48] The Supreme Court as well as the lower court felt that the petitioners were fit for the responsibilities of adoption. Although the New Jersey Supreme Court used religion as a factor in determining the child's best interests, that factor alone was not held controlling or decisive.[49]

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44. Commonwealth *ex rel.* Donie v. Ferree, 175 Pa. Super. 586, 106 A.2d 681 (1954); Commonwealth *ex rel.* Kuntz v. Stackhouse, 176 Pa. Super. 361, 108 A.2d 73 (1954); Commonwealth *ex rel.* Stevens v. Shannon, 107 Pa. Super. 557, 164 A.2d 352 (1933).

45. *See, e.g.*, Sigesmund v. Sigesmund, 115 Cal. App. 2d 628, 252 P.2d 713 (1953); Randall v. Randall, 28 So. 19 (Miss. 1900); Roland v. Hankee, 58 Dauph. Co. 271 (Pa. O. C. 1947); Commonwealth *ex rel.* Gessler v. Gessler, 40 Del. Co. 175 (Pa. O. C. 1953); Schreifels v. Schreifels, 47 Wash. 2d 409, 287 P.2d 1001 (1955).

46. *In re* Adoption of "E", 59 N.J. 36, , 279 A.2d 785, 790 (1971).

47. *Id.* at 49, 279 A.2d at 792.

48. The validity of a court's inquiry into the petitioner's religious benefits is upheld in those states whose courts apply a discretionary and no weight approach. *See, e.g., In re* Adoption of a Minor, 228 F.2d 446 (D.C. Cir. 1955).

49. *See* text accompanying notes 40, 41 *supra.*

C. No Weight Approach

The final approach to judicial interpretation of adoption statutes which deal with a child's religion is that which gives little or no weight to the religious issue.[50] Under this approach the matching of the child's and the petitioner's religion is clearly subordinate to the child's temporal welfare. When a conflict arises, if the court determines that the child's best interests are served by providing it with a home and suitable parents rather than placing it in an institution the court will allow the adoption despite the difference in religion.[51]

This no weight approach is somewhat similar to the discretionary approach in that religion is considered in determining the moral and ethical fitness of the petitioners. These two viewpoints diverge, however, in that under the no weight approach religion is a completely subordinate factor, whereas under the discretionary approach, religion is a factor equal with all others in determining the applicant's qualifications.[52] However, under both religion is never afforded the controlling weight that could bar the adoption.

Although the no weight jurisdictions give less weight to religious considerations than the discretionary jurisdictions, this difference is even more accentuated when the no weight and mandatory jurisdictions are contrasted. For the purpose of comparing these two approaches, assume that a Jewish couple (or a couple having no religious affiliation) seek to adopt a Baptist child in both a mandatory and no weight jurisdiction. In the former case, the chances of success are virtually nonexistent.[53] However, in the latter case, the chances of obtaining the adoption would be totally unaffected by these circumstances because in a no weight state (1) no adoption is ever barred because of a difference in religion between the petitioners and the child, (2) no adoption is ever barred because of the petitioner's lack of a religion and (3) the suitability of the petitioners is not judged in light of religious criteria.

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50. Two states that have adopted the no weight approach are Missouri and Ohio. *See, In re* Duren, 355 Mo. 1222, 200 S.W.2d 344 (1947); Angel v. Angel, 2 Ohio Ops. 2d 136, 140 N.E.2d 86 (1956). The English courts have adopted the same rule. *See, e.g., Re* Carrol, 1 K.B. 317 (C.A. 1931).

51. *In re* Duren, 355 Mo. 1222, 200 S.W.2d 344 (1947); Parks v. Cook, 180 S.W.2d 64 (Mo. App. 1944).

52. Religion does play an important role in determining whether the adoption should be granted when the religious doctrines of the petitioners do in fact threaten the health or physical well being of the child. *See generally,* Annot., 66 A.L.R.2d 1410, 1419 (1959).

53. *See* text accompanying notes 21, 24 *supra.*

Missouri is the prime example of a jurisdiction whose courts have implemented a no weight interpretation.[54] The courts of that state have consistently refused to accord controlling weight to the fact that the child was merely born or baptized[55] into a certain religion at all.[56] In Missouri the controlling weight is clearly on the temporal welfare of the child rather than religious and spiritual considerations.

A few courts which have adopted a no weight approach, have indicated that religious matters should be kept *entirely* outside the courts determination.[57] One Missouri court would not consider any religious factor because it was not the proper forum to adjudge spiritual matters since the state views all religions as well as non-religion with an equal eye when considering a child's custody.[58] Whether the courts give little effect to religious considerations or refuse to consider them at all, the effect is the same and no adoption will be denied solely on religious grounds.

The no weight jurisdictions find religion of little relevance, both as to its bearing on the best interests of the child and as to the moral fitness of the petitioners.[59] This is contrary to the majority's view in *Adoption of "E"*, but is similar to the views of Chief Justice Weintraub in his concurring opinion in *Adoption of "E"*. There he emphatically states:

> I think it is not the state's business to prowl among anyone's thoughts and to label him fit or unfit, in whole or in part, because his views are distasteful to someone in a placement agency or in the judiciary. I find such an inquiry to be as offensive as it is meddlesome and irrelevant to the true issue.[60]

The Chief Justice's argument did not comport with the discretionary interpretation previously established in New Jersey and reaffirmed by the majority. In effect Chief Justice Wientraub was advocating the adoption of a no weight approach.

An interesting aspect of *Adoption of "E"* is that the case illustrates all three of the means adopted by the various courts in interpreting the religious aspects of their adoption statutes: the Chief Justice's concurring opinion is an affirmation of the no weight approach, the majority opinion of the New Jersey Supreme Court is an application of the discretionary approach and the New Jersey superior court opinion was an abortive attempt to adopt the mandatory approach.

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54. *In re* Duren, 355 Mo. 1222, 200 S.W.2d 344 (1947); Parks v. Cook, 180 S.W.2d 64 (Mo. App. 1944).
55. State *ex rel.* Baker v. Bird, 253 Mo. 659, 162 S.W. 119 (1953); *In re* Dixon, 254 Mo. 663, 163 S.W. 827 (1914).
56. Matter of Clements, 12 Mo. App. 592 (1882).
57. *E.g.*, Jones v. Bowman, 13 Wyo. 79, 77 P. 439 (1904).
58. *Re* Doyle, 16 Mo. App. 159 (1884).
59. *In, re* Duren, 355 Mo. 1222, 200 S.W.2d 344 (1947).
60. *In re* Adoption of "E", 59 N.J. 36, 58-59, 279 A.2d 785, 797 (1971).

IV. Constitutionality of Religious Requirements

Perhaps the most significant aspect of *Adoption of "E"* is the New Jersey Supreme Court's discussion of the constitutionality of denying an adoption solely for religious reasons.[61] Normally courts do not rule on a constitutional issue if it is possible to decide the case on other grounds.[62] This policy has been so rigidly followed and there are so few decisions considering the constitutionality of religious protection statutes that one commentator observed that the debate over the constitutionality of such laws "has for the most part been conducted in a vacuum."[63] Contrary to the normal policy of judicial silence, the New Jersey court did consider the constitutional aspects of the problem when they could have reversed the lower court on *stare decisis* grounds[64] or on the basis that the lower court had abused its discretion.[65]

The first amendment to the United States Constitution which deals in part with the relation between government and religion provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[66] This portion of the first amendment traditionally has been broken into two separate but related clauses: the establishment clause, and the free exercise clause. Both of these clauses have been made applicable to the states through the fourteenth amendment.[67]

A. The Establishment Clause

Because there is a lack of precedent concerning the validity of religious protection statutes and their application, it is necessary to isolate the judicial approach to religious factors in comparable situations and then analogize those findings to adoption statutes. The first case relevant to the establishment of religion clause is *Everson v. Board of Education.*[68] In *Everson* the United States Supreme Court upheld the validity of a resolution of the New York Board of Education authorizing the reimbursement of fares paid to public carriers by parents for the transportation of children to sectarian schools as well as public schools. In defining the establishment clause the Court said:

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61. *Id.* at 51-57, 279 A.2d at 793-96.
62. *E.g.*, State v. Salerno, 27 N.J. 289, 296, 142 A.2d 636, 639 (1958).
63. Broeder & Barrett, *Impact of Religious Factors in Nebraska Adoptions*, 38 Neb. L. Rev. 641, 644 (1959).
64. 59 N.J. 36, 45, 279 A.2d 785, 790 (1971).
65. *Id.* at 50, 279 A.2d at 793.
66. U.S. Const. amend. I.
67. Cantwell v. Connecticut, 310 U.S. 296 (1940).
68. 330 U.S. 1 (1946).

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will, or force him to profess a belief or disbelief in any religion. No person can be punished in entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between church and state."[69]

Thus, violation of the establishment clause does not depend upon direct governmental intervention or compulsion in establishing a religion, but is violated if states directly or *indirectly* coerce non-observing citizens to join a religious body.[70] *Everson* illustrates that the establishment clause prevents government from aiding religious organizations, and from directly and indirectly *influencing* a person in the profession and practice of his religious beliefs.

In light of the above considerations, does the imputation of a religion to a child being offered for adoption violate the establishment clause? The question suggests its own answer. Because imputation of a religion imposes a religion on the child, the courts are directly coercing religious affiliation. This is particularly true in those jurisdictions whose courts have applied a mandatory approach. There, every child must have a religion and those which are found abandoned are assigned a religion at random where there is no evidence of any religious affiliation.[71] The effect of this policy which imposes a religion upon a child[72] is to promote the continuance of religion generally, by providing it with new mem-

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69. *Id.* at 15-16.

70. Engle v. Vitale, 370 U.S. 421 (1962).

71. The assigning of a religion to foundlings is done in a simple rotation basis as Protestant, Catholic or Jewish as they are found and without regard to the race or natural origins of the child. Furthermore, New York by statute requires that parents surrendering a child specify a religion; a failure to do so makes the child technically unadoptable. N.Y. DOM. REL. LAW § 112(2). List, *A Child and a Wall: A Study of Religious Protection Laws,* 13 BUFF. L. REV. 9, 37 (1963). *Contra,* Dickens v. Ernesto, 30 N.Y.2d 61, 330 N.Y.S.2d 346 (1972).

72. The policy of imputing a religion to a child is absent in discretionary and no weight jurisdictions. However, there is a general policy of "matching" the petitioner's and the child's religion, but the policy is not strictly applied.

bers and by promoting the interests of organized religion's approach to morality and ethics. It is submitted that this clearly violates the establishment clause by aiding religion and preferring formal religious ideals over non-religious beliefs.

The constitutional prohibition against arbitrarily assigning a religion to a child was expressed in a different context in *Zorach v. Clauson.*[73] The United States Supreme Court in *Zorach* was faced with the question of whether New York's released time program from school to attend religious training classes was unconstitutional as violative of the establishment clause. The Court upheld the constitutionality of the program but noted that it was one thing to let children fully exercise their religion and another to give them a religion to practice.[74]

This dictum is clearly relevant when applied to adoption proceedings. If the prohibition against infringement of the first amendment is absolute, as the Court stated in *Zorach* then adoption proceedings should offer no exception to this prohibition. A court or state agency that has imputed a religion to a child clearly has gone beyond letting him "freely exercise religion" and has entered the prohibited area of giving him a religion to practice. It is submitted that those jurisdictions that impute a religion to a child where the natural parents have no preference or specify no religion clearly violate the mandate in *Zorach* that government must not thrust any sect on any person nor make religious observance compulsory.[75]

The test adopted by the United States Supreme Court to determine the constitutionality of legislation and its application with regard to the establishment clause is set forth in *Braumfeld v. Brown.*[76] There the Court held that Pennsylvania's Sunday closing laws were constitutional despite the burden placed on Jewish businessmen whose religion required them to close on Saturday as well. The Court looked to the purpose of the statute and applied this test: If a state attempts to regulate the conduct of its citizens by enacting a general law whose purpose and effect is to advance the state's secular goals, the statute is not violative of the establishment clause despite its indirect burden on religious ob-

73. 343 U.S. 306 (1952).
74. *Id.* at 311.
75. *Id.* at 314.
76. 366 U.S. 599, 607 (1961). *See also,* Abington School District v. Schempp, 374 U.S. 203, 222 (1963); McGowan v. Maryland, 366 U.S. 420, 442 (1961). *See generally,* Everson v. Board of Education, 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296 (1940).

servance, unless the state could accomplish its purpose by other means which do not impose such a burden.[77] The test is twofold: (1) the statute must have a valid secular purpose;[78] and (2) the means utilized to effect that purpose must not burden religious observance unless it is unavoidable. By analogizing the mandatory, discretionary and no weight approaches in light of the *Braumfeld* criteria, it will be possible to determine which, if any, of these judicial philosophies violate the establishment clause.

1. Mandatory jurisdictions

The argument used by courts to justify their mandatory approach to religious protection in adoption proceedings is that such an interpretation affords the child "the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience."[79] This objective is purportedly attained by requiring a petitioner to show a religious affiliation.

Considering first the purpose of mandatory adoption statutes in relation to the *Braumfeld* test, it is apparent that the mandatory approach is valid in that it guarantees the child the right to freely exercise the religion of his choice. However, the purpose presupposes that the child has a religion. Thus, where the child is of sufficient years to understand and embrace a religion or where a child of tender years receives the religion of his parents the purpose is of course valid. But where the child is a foundling or of insufficient years to comprehend any religion and the natural parents have not specified one, the effect of the purpose shifts from guaranteeing the child the right to freely practice his religion to compelling him to practice a specified religion.[80] In these instances the purpose is no longer secular as required by the *Braumfeld* test,[81] but religious which, it is submitted, would be sufficiently violative of the establishment clause to render the application of the particular statute to those cases unconstitutional.

A very recent case dealing with the application of the *Braumfeld* test to New York's mandatory approach is *Dickens v. Ernesto*.[82] There the Court recognized that there must be a secular purpose to the legislation and felt that New York's placement of a child with adoptive parents of the same religion undoubtedly fulfilled a "secular legislative purpose." However, the Court was

77. Braumfeld v. Brown, 366 U.S. 599, 607.

78. For a discussion of the meaning of "a valid secular purpose," *see* McGowan v. Maryland, 366 U.S. 420, 442 (1961).

79. *In re* Adoption of "E", 112 N.J. Super. 326, 330, 271 A.2d 27, 30 (1970).

80. This is violative of the free exercise clause also in that it coerces the child to attend a specific church. *See* text following note 93 *infra.*

81. *See* text accompanying note 75 *supra.*

82. 30 N.Y.2d 61, 330 N.Y.S.2d 346 (1972).

only looking at those instances where the child has a religion and was not speaking to cases where the court imputes a religion to the child and then uses that religion as a basis for requiring the petitioner's religion to match that of the child's.

Apart from the purpose of the state, the *Braumfeld* test poses a second criterion for the determination of violation of establishment clause: the means for effecting the statute's purpose must not burden religious observance unless no other means are available. The means employed by the courts in interpreting the statutes is to require the petitioner's religion to match that of the child.

Looking first to those situations where the child does possess a religion, the requirement that the prospective parent's religion match that of the child's does not violate the establishment clause. Since that is the only way to allow the child to be placed in a home without losing his right to practice his religion in that home. Of course this presupposes that the child's religion is one validly held by him through his choice or given to him by his parents under the parental right theory and not one merely imputed to him by a court. To place the child in a home practicing a different religion would in effect be denying the child the right to practice his religion in order to secure his temporal welfare. Although the requirement of religious compatibility is a burden on the prospective parents, there appears to be no other effective means to secure to the child his right to practice his religion after adoption. Therefore, in those situations where the child has a religion the second part of the *Braumfeld* test is met and the requirement that the petitioners show a religious affiliation, and that it matches the child's is constitutional.

However, as was previously mentioned, this is distinguishable from the situation where the child has no religion specified by his natural parents or where a religion is imputed to the child by the court. Here the child does not have a religion *of his own choosing* that needs to be protected. The religion that the court has imputed to the child is not controlling because such an imputation on the authority of *Everson* and *Zorach* violates the establishment clause of the first amendment. Since the child does not validly hold any religion, no valid secular purpose is achieved by applying a statute which requires that the petitioner's and child's religion match. Therefore, it is submitted that by applying the *Braumfeld* criteria which requires a valid secular purpose, the court's application of their religious protection statutes to situations where the

child does not hold a religion does not fulfill a valid secular purpose and is therefore unconstitutional.

Aside from this invalid purpose of requiring the petitioner's and child's religions match when the child has no religion, it is possible to show that the means for effecting that purpose is invalid under the second portion of the *Braumfeld* test. That portion of the test requires that religious observance, or non-observance, must not be burdened unless unavoidably so. By requiring the prospective parents to show a religious affiliation which matches the religion arbitrarily determined to be that of the child's places a burden on those who have a different belief or no belief at all. However, this in itself would not render the requirement invalid. It must be shown that no other means would sufficiently carry forth the purpose of the law without burdening some in their belief or non-belief. This may be done by recognizing the simple fact that a child who has had a religion unconstitutionally imputed to him has no religion and, therefore, anyone with or without a religion may be permitted to adopt him. Such a solution would underscore the fact that the purpose of religious matching is subservient to the basic purpose of all adoptions which is to secure the child's temporal welfare by placing him in a suitable home. Under this plan of not requiring the potential parents to divulge their religious beliefs, the goal of insuring the child's future welfare is more easily accomplished since the often troublesome chore of "matching" religions is circumvented. The continuation of the present practice of the mandatory jurisdictions in "matching" religions where the child has merely been imputed with a religion places a burden on otherwise qualified petitioners. This is contrary to the second portion of the *Braumfeld* test and is therefore an unconstitutional infringement of the establishment clause of the first amendment.

In summary, the application of the *Braumfeld* test to those jurisdictions giving their religious protection statutes a mandatory interpretation shows that (1) where the child possesses a religion prior to the adoption proceedings the purpose of the statute which requires a matching of petitioner's and the child's religion is to protect the child's civil right to continue in his own religious faith after adoption and is constitutional; (2) the means for effecting this purpose, the matching of religions, is constitutional since no other means appears to be available to protect the child's right to freely exercise his religion, unless a petitioner would agree to raise the child in a different religion from that which the petitioner embraces; (3) where the child has no religion prior to the adoption proceeding except one imputed to him by the court, the statute requiring the petitioner's religion match the child's imputed religion is unconstitutional because the purpose is no longer secular, but religious in that it compels the child to practice a specific

religion; and (4) because of the burden placed on prospective parents with a different religion or no religion at all in effecting this invalid purpose by requiring that their religions match instead of recognizing the inapposite nature of the statute when the child holds no religious beliefs makes the means as well as the purpose unconstitutional as defined by the *Braumfeld* test.

2. *Discretionary and no weight jurisdictions*

In analyzing the discretionary and no weight approaches in light of the *Braumfeld* criteria it may be assumed that the purpose of the religious protection statute is the same as that of the mandatory jurisdictions *i.e.*, to give the adopted child the right to freely exercise the religion of his choice. Since this purpose was shown to be constitutional in the mandatory jurisdictions there is no reason for it to be otherwise in the discretionary and no weight jurisdictions. This is especially true in these jurisdictions where the imputation of religion to a child is not incident to the adoption proceeding.

The aspect which differentiates the discretionary and no weight courts from the mandatory courts is the means used for effecting that purpose. Although there is a general policy of matching religions in these jurisdictions, this policy plays far less a part than in the mandatory jurisdictions and is not used when the child has no religion or where the best interests of the child would not be served. This is entirely consistent with the *Braumfeld* decision and represents a valid secular purpose in that it guarantees the child's right to practice his own religion.

Because religious factors are used in the discretionary approach to determine the moral and ethical fitness of the petitioners,[83] it may be asked whether this means is violative of *Braumfeld*. If a court were able to determine moral and ethical fitness without resort to religious factors, could reliance on such factors render the procedure violative of the establishment clause. Further analysis indicates that this is not the case. Because controlling weight is not given to the religious factor, there is no "burdening" of the petitioner's beliefs in the *Braumfeld* sense. Religion is used merely as one factor in many in determining the petitioner's moral and ethical fitness,[84] and the presence or lack of a religious belief is not determinative.[85]

83. *In re* Adoption of "E", 59 N.J. 36, 50, 279 A.2d 785, 793 (1971).
84. *See* note 37 *supra*.
85. Because religion is merely one factor in many and lacks controlling

A second consideration in determining whether the type of judicial inquiry, for the purpose of judging moral and ethical fitness, carried out in discretionary jurisdictions violates the establishment clause is isolated by analyzing the purpose of such an examination. Those "discretionary approach" courts have done so for secular rather than religious reasons. The secular purpose of examining religious beliefs in conjunction with other factors is to determine whether the petitioners are qualified to raise the child properly and the prospective parents' religion is examined to assure the child the benefits of a good family life. Since this purpose is in harmony with the general purpose of all adoption, which is to place the child in a good home, the purpose served by this examination is certainly secular and not violative of any constitutional mandate.

There being no "burden" that either advances or inhibits religion in the discretionary approach, it is less likely that any violation of the establishment clause exists in those no weight jurisdictions. In the no weight jurisdictions, religion is neither used to bar an adoption nor is it given the weight afforded to it in the discretionary approach in determining the fitness of the petitioners.[86] The child's best interests are the primary consideration in a no weight jurisdiction. Clearly, the pursuit of such a purpose is not violative of the establishment clause.

The purpose of examining the religious beliefs of petitioners in conjunction with other factors in those discretionary and no weight jurisdictions is to determine whether the petitioners would be suitable adoptive parents. This purpose is a valid secular purpose and in line with the criteria set forth in *Braumfeld*. The means for effecting this purpose are completely constitutional also, since unlike the mandatory approach, the discretionary and no weight approaches refuse to give controlling weight to the religious factor.

The establishment clause is perhaps the primary criteria by which religious protection laws are examined, but since it is related to the free exercise clause it is necessary to examine the three jurisdictional approaches to religious protection laws and their relation to the free exercise clause in order to more fully delineate the constitutional boundaries of each approach.

B. *The Free Exercise Clause*

The free exercise clause of the first amendment safeguards

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weight, the absence or presence of a religion would not be determinative of moral and ethical fitness. This would not place a burden on any petitioner to show a religious affiliation or profess a belief in a different religion from that which he embraces because of the non-determinative weight afforded religion considerations. *See* notes 37-39 *supra*.

86. *See* text accompanying note 52 *supra*.

the rights of individuals to worship as they see fit.[87] This constitutional guarantee includes freedom from religion, with the right to believe, speak, write and advocate antireligious ideas or merely to have no beliefs at all.[88] Like the establishment clause, the free exercise clause is made applicable to the states by the fourteenth amendment,[89] but unlike the establishment clause it may be violated only by direct compulsion.[90] Because the free exercise clauses's purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority, it is therefore necessary to show the coercive effect of an enactment or its application as it operates against the petitioner in the practice of his religion.[91] The distinction between the establishment and free exercise clause is apparent—"a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause need not be so attended."[92]

1. Mandatory jurisdictions

In analyzing the mandatory approach's application of religious protection laws to determine its coercive effect, if any, upon the child or the petitioners, it is necessary to examine the basic concept of imputing a religion to a child where no religion is specified by the natural parents.[93] Such a policy of imputation does not permit the child to choose his own religion or no religion at all. Instead the child is forced to practice that religion specified by the court. The implementation of such a policy by those mandatory jurisdictions certainly cannot be deemed anything less than coercive and therefore violative of the free exercise clause without

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87. *Ex parte* Jentzsch, 112 Cal. 468, 44 P. 803 (1896). There the court said,

> Under a Constitution which guarantees to all equal liberty of religion and conscience, any law which forbids an act in itself *contra bonis mores*, because that act is repugnant to the beliefs of one religious sect, of necessity interferes with the liberty of those who hold to other beliefs or none at all.

Ex parte Jentzsch, 112 Cal. 468, 471, 44 P. 803 (1896). *See also* Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, , 315 P.2d 394, 401 (1957) (quoting the Jentzsch holding).

88. Fellowship of Humanity v. County of Alameda, 153 Cal. App. 673, 315 P.2d 394 (1957). There the court did not believe that a comprehensive Sunday closing law infringed or coerced anyone in their belief or non-belief.

89. Cantwell v. Connecticut, 310 U.S. 296 (1940).

90. Engle v. Vitale, 370 U.S. 421 (1962).

91. *See* Abington School District v. Schempp, 374 U.S. 203, 223 (1963).

92. Abington School District v. Schempp, 374 U.S. 203, 223 (1963).

93. *See* text accompanying note 71 *supra*.

losing the complete significance of that clause which is to secure religious liberty.

A related problem occurs when the petitioners are granted the adoption of a child upon the condition that the child continue to be raised in a religion different from that of the adopting parents.[94] Such a decision may be coercive on the adopting parents since they will have to send their child to religious services different from their own. Although this condition of adoption may be shocking, it is not a violation of the protection afforded the adopting parents under the free exercise clause because the compulsion is only indirect. That is, while the petitioners may feel bound to attend religious services with the child, either out of a sense of duty or convenience, there is no actual governmental compulsion to attend religious services with the child and therefore no direct coercion, which must be shown to render the free exercise clause violated.

Finally, the question of whether or not the denial of a petition to adopt is violative of the free exercise clause when that denial is based solely on the petitioner's lack of religious beliefs may be determined by analyzing the effects such a decree would have on the petitioner's beliefs. Such an analysis was conducted by the New York Court of Appeals in the recent case of *Dickens v. Ernesto*.[95] The court upheld the lower court's determination that there was no violation of petitioner's constitutional rights, but directed the respondent county Department of Social Services to process petitioner's application. The petitioners argued on appeal that the "matching" requirements violated their right to the free exercise of religion in that they were forced to choose between their right to profess no religion and their right to adopt since there were no children in the area without a religion. The court took judicial notice that "there have been instances in which natural parents have indicated 'their indifference to the religious placement of their child'" and that petitioners would be eligible to adopt such a child.[96] Under these circumstances the court felt that the religious conformity provisions served a valid secular purpose and did not discriminate against, penalize, or coerce the petitioners to assume a religious faith in order to adopt a child.[97]

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94. *See* note 33 *supra*.

95. 30 N.Y.2d 61, 330 N.Y.S.2d 346 (1972).

96. *Id.* at 64, 330 N.Y.S.2d at 350. However, such a position is contrary to New York's previous case law dealing with the statutory requirement that the natural parents must specify a religious preference when surrendering a child for adoption. This may indicate that New York has liberalized its mandatory approach in applying its statutory religious requirements and is now leaning toward a discretionary approach. *See* text accompanying note 71 *supra*.

97. *Id.* The New York Court of Appeals cites in support of this position *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). In that case the Supreme Court held that the plaintiff could not be refused unemployment com-

The position adopted by the New York Court of Appeals in *Dickens* is subject to criticism by looking to the effect of the court's decision on the petitioner's status. An examination of that status reveals that the petitioners are not able to adopt a child because of their non-religious beliefs. The only way the petitioners could adopt one of the children presently available would be to first adopt a religious belief which may be repugnant to their own beliefs. Thus, by the court's application of religious requirements there is established the direct coercion of petitioner's belief—coercion to adopt a religious belief instead of retaining their non-belief —which the free exercise clause prohibits and makes unconstitutional.

In summarizing the effect that the strict application of the mandatory jurisdictions' religious requirements have on the free exercise clause it has been shown that (1) the coercing of a child to practice a specific religion when that religion is imputed to him by the courts is unconstitutional because the child no longer has the option to refrain from practicing a religion; (2) that the granting of a cross-religious adoption or the granting of an adoption to petitioners who profess no religious beliefs is not the direct coercion required to violate the free exercise clause, but is instead only indirect in that it arises out of a sense of duty or convenience; (3) that the refusal of an application to adopt solely on the basis that the applicants have no religion and therefore are unable to match the child's religion is unconstitutional because it compels the applicants to assume a religious faith in order to adopt a child.

2. Discretionary and no weight jurisdictions

Since neither the imputation of a religion to a child by the court nor the denying of an adoption solely because the petitioners lack religious beliefs are evidenced in the discretionary or no weight jurisdictions, it is not necessary to reconsider them again. However, it is necessary to consider the constitutional ramifications which arise from the common practice adopted by the discretionary and no weight courts of examining a petitioner's re-

pensation because she refused to accept employment which required her to work on Saturdays, her Sabbath. However, this case does not stand for the position which the New York court cites. The rationale of *Sherbert* was that South Carolina could not coerce the plaintiff to adopt a repugnant belief in order to qualify for unemployment compensation. Applying that rationale to the *Dickens* case, it would appear that the New York court could not require the petitioners to show a different set of beliefs than those they already embraced in order to qualify for adoption of a child.

ligious beliefs for the purpose of aiding it in its determination of the petitioner's moral and ethical fitness.[98] Although such considerations may be viewed as an indirect influence on those seeking to adopt, it is not the direct coercion necessary to violate the free exercise clause. This is because in the discretionary and no weight jurisdictions no one must show a religion in order to adopt any child if the child's best interests are served.

Since no constitutional objections arise out of the discretionary approach, whereas many objections may be found within the mandatory application of religious protection laws, it would be of value to see how the New Jersey Supreme Court in *Adoption of "E"* dealt with the lower court's implementation of a mandatory approach.

C. *Constitutional Objections to Religious Requirements Set Forth in In re Adoption of "E"*

Without question the New Jersey Supreme Court could have overruled on *stare decisis* grounds the lower court's denial of adoption in *In re Adoption of "E"*.[99] By choosing to discuss the constitutional merits of the case, however, the court has provided the opportunity for this Note to apply the general principles discussed above to an actual case.

The majority opinion points out that government must maintain a posture of "wholesome neutrality" on the question of religion.[100] Not only must government remain neutral between sects,[101] but between religion generally and non-religion as well.[102] The court analogized the petitioner's lack of religious beliefs to the United States Supreme Court's decision in *Torcaso v. Watkins*,[103] where the question of whether a state could disqualify atheists from serving as notaries public was at issue. In that case the Court held that the religious qualification was unconstitutional because neither the state nor the federal government "can pass laws or impose requirements which aid all religions as against non-believers. . . ."[104] The New Jersey Supreme Court in *Adoption of "E"* expressly held that the opportunity to hold the office of notary public was no more valuable than the opportunity to adopt. In either case, disqualification solely on religious grounds violates that person's right to freely exercise his religious beliefs.

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98. *See* text accompanying notes 37-40 *supra*.
99. 112 N.J. Super. 326, 271 A.2d 27 (1970).
100. 59 N.J. 36, 51-52, 279 A.2d 785, 793 (1971).
101. *E.g.*, McLaughlin v. McLaughlin, 29 Conn. Supp. 278, 132 A.2d 420 (1951).
102. Everson v. Board of Education, 330 U.S. 1, 18 (1946). *See also*, Walz v. Tax Commissioner, 397 U.S. 664, 695 (1970) (concurring opinion of Harlan, J.).
103. 367 U.S. 488 (1961).
104. *Id.* at 495.

A similar analogy could have been made to the case of *Schowgurow v. State*[105] which would have drawn out and clarified the implications of the lower court's decision regarding the equal protection clause of the fourteenth amendment. In *Schowgurow* the defendant appealed his murder conviction to the Maryland Supreme Court on the ground that the jury was picked from only those believing in the existence of God, as required by the Maryland Constitution. The defendant was a Buddhist and did not believe in the existence of a Supreme Being. The defendant claimed that he had been denied the equal protection of the laws since he was tried by a jury from which members of his religion were summarily excluded.[106] The Maryland Supreme Court, citing *Torcaso*, found that just as the religious requirement for notaries public was violative of the establishment and free exercise clauses of the first amendment, so too was the religious requirement for prospective jurors. The court further ruled that because religious beliefs served as a condition precedent to serving in either capacity, it effectively denied the defendant the equal protection of the laws.[107] Since the lower court in *Adoption of "E"* also made religious beliefs a condition precedent[108] to granting an adoption, it is certainly arguable that such a requirement constituted a violation of equal protection.

In *Adoption of "E"*, the lower court rejected the reasoning of the *Torcaso* and *Schowgurow* decisions. The court distinguished *Torcaso* by saying "Torcaso was of age to make his own decisions as to the belief or nonbelief in God," whereas "[i]n the present case E is of tender years," without the maturity or understanding to develop a religious belief.[109] Although the court distinguished *Torcaso* on its facts, it failed to offer any reason for its decision that religion should be given preference over atheism. Nor did the trial court perceive that by requiring a religious showing, the petitioners' rights under the equal protection clause were violated as in the *Schowgurow* case.

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105. 240 Md. 121, 213 A.2d 475 (1965).

106. *Id.* at 125, 213 A.2d at 479. For a discussion of similar discrimination because of race, *see* Eubanks v. Louisiana, 356 U.S. 584 (1958).

107. *Id.* at 125, 213 A.2d at 481.

108. Though the trial judge in *Adoption of "E"* did not explicitly state that religion was a condition precedent to granting an adoption, the effect is the same in light of the following:

> The child should have the freedom to worship as she sees fit and not be influenced by parents or exposed to the views of prospective parents who do not believe in a Supreme Being.

In re Adoption of "E", 112 N.J. Super. 326, 331, 271 A.2d 27, 30 (1970).

109. *Id.* at 331, 271 A.2d at 30 (1970).

The New Jersey Supreme Court rejected the lower court's opinion and adopted the rationale of the *Torcaso* and *Schowgurow* decisions. The majority held that the prerequisite showing of religious affiliation violated the mandate of the establishment clause requiring governmental neutrality between religion and non-religion. While it did not specifically mention a violation of the equal protection clause, had it done so it probably would have recognized the unconstitutionality of arbitrarily classifying some citizens as unfit to adopt because they lack religious beliefs. However, the religious requirement of the lower court was recognized as violative of the establishment and free exercise clause in that it excluded some because of their non-belief by burdening those petitioners' beliefs and by coercing them to adopt a religion for the purpose of adopting a child.[110]

The concurring opinion of Chief Justice Weintraub extends the majority's reasoning by stating that courts can neither require a religious showing in prospective parents as strictly required by the lower court, nor may they then consider religious beliefs as bearing on the petitioner's moral and ethical fitness,[111] which the majority allowed. The Chief Justice took the simple position that since religion was not a relevant requirement for the purpose of preventing the adoption, it should not play any lesser role in determining the petitioner's moral and ethical fitness.[112] He argued that there is no catalogue of tolerable beliefs and for a court of law to inquire into the issue of religion is unquestionably in violation of the first amendment.[113]

To a certain extent, this view is compatible with that of the United States Supreme Court in *Engle v. Vitale*.[114] The court there ruled unsonstitutional a prayer prepared by New York's Board of Regents to be recited in the public schools saying "that religion is too personal, too sacred, too holy to permit its" unhallowed perversion "by a civil magistrate."[115] However, this lan-

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110. The court said,
> The issue is not whether an individual has the right to choose religion or non-religion, but whether the government has the power to impose religion or to place a burden on one's beliefs regarding religion. Burdening the opportunity to adopt with religious requirements does both and if, as we believe, the government lacks such a power, religious requirements violate the Establishment and the Free Exercise Clauses of the First Amendment.

In re Adoption of "E", 59 N.J. 36, 53, 279 A.2d 785, 794 (1971).

111. *Id.* at 58, 279 A.2d at 796-97 (1971).

112. *Id.* at 58, 279 A.2d at 797 (1971).

113. *Id.*

114. 370 U.S. 421 (1962).

115. *Id.* at 432. The rationale of the *Engle* decision is distinguishable from that of the present case in that there the New York Board of Regents was promulgating the "religion" to be followed whereas in the majority opinion of *Adoption of "E"* there was no prescribing of a religion, but merely an examination of beliefs already held in aiding the court in its determination of the petitioners' moral and ethical fitness.

guage does not fully support the Chief Justice's opinion that an examination of religious beliefs should never be entered into even when the weight afforded to religion may be small in comparison to other secular factors. Surely the mere examination of religious beliefs for the enlightenment of the court is not an establishment of religion when compared to the *Engle* decision where a prayer for all New York school children was created. The Chief Justice apparently confused the admissibility of evidence of religious beliefs with the weight that the court should afford those considerations. Evidence of religious affiliation or beliefs should always be relevant when determining the moral and ethical fitness of the petitioners.[116] It is only when those considerations are given controlling weight, as they were in the lower court's decision in *Adoption of "E"*, that it violates the first amendment.

V. Conclusion

In re Adoption of "E" has dual significance. First, all three approaches to religious protection statutes are represented. The mandatory approach adopted by the lower court was explicitly rejected on appeal because the New Jersey Supreme Court believed that to afford controlling weight to religious considerations was violative of the establishment and free exercises clauses of the first amendment. Instead the Supreme Court adopted the discretionary approach, which is the prevailing view in this country. Therefore, the no weight approach proposed by Chief Justice Weintraub was necessarily rejected. The majority believed that religion was a relevant consideration when placed in the proper perspective of aiding the court in its determination of the moral and ethical fitness of the petitioners.

The second aspect of importance is the New Jersey Supreme Court's consideration of the constitutional implications of its own and the lower court's rulings. The lower court's position was held to be unconstitutional as violative of the establishment and free exercise clause because it not only imposed a religion contrary to the mandate of *Zorach v. Clauson*,[117] but placed a burden on one's beliefs regarding religion contrary to the *Braumfeld v.*

116. The majority opinion states:
> [Q]uestions concerning religion as it bears on ethics are not constitutionally forbidden because they serve a valid secular purpose [and] may be evidential of moral fitness to adopt in relation to how the applicants will conduct themselves as adopting parents.

In re Adoption of "E", 59 N.J. 36, 57, 279 A.2d 758, 796 (1971).

117. 330 U.S. 1, 15-16. *See* text accompanying note 73 *supra*.

Brown[118] and *McGowan v. Maryland*[119] tests, and the *Torcaso v. Watkins* decision.[120] In supporting its own position that religion may not be given controlling weight, but may validly be considered in determining the moral fitness of the petitioners, the court looked closely at the purpose of such an examination. The court believed that the purpose of the examination is secular in that it may be evidential of moral and ethical fitness in relation to how the applicants will conduct themselves as adopting parents. This is contrary to the no weight position adopted by Chief Justice Weintraub, who believed that religious beliefs were not admissible because they served no secular purpose whatsoever.[121]

Finally, in determining the constitutional distinction between the three approaches, it has been shown that the discretionary and no weight jurisdictions, unlike the mandatory approach, do not violate the constitutional safeguards of the first amendment. The difference lies in the weight afforded the religious factor in those jurisdictions. It is only when controlling weight is afforded religious considerations which gives it the status of a condition precedent, as in the mandatory jurisdictions, that the examination of religious beliefs for the purpose of adoption becomes unconstitutional.

H. KIVLAN

118. 366 U.S. 599, 607 (1961). *See* text accompanying note 75 *supra.*
119. 336 U.S. 420, 442 (1961). *See* text accompanying note 76 *supra.*
120. 367 U.S. 488 (1961). *See* text accompanying notes 102, 103 *supra.*
121. *In re* Adoption of "E", 59 N.J. 36, 58, 279 A.2d 785, 797 (1971) (concurring opinion of Weintraub, C.J.).